SUPREME COURT, U. S.

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IN THE

Supreme Court of The United States

1968

No. 213

ERNEST CLIFTON LANGLEY,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

WILLIAM C. ERBECKER,
1005 Lemcke Bldg.,
Indianapolis, Indiana,
Attorney for Petitioner.

Central Publishing Company, Inc., Indianapolis, Ind.

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TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner respectfully asks this Court to issue a Writ of Certiorari to review the final judgment of the Supreme Court of Indiana which affirmed the judgment of the lower Court finding petitioner guilty of the crime of robbery and sentencing him to an indeterminate term of not less than ten nor more than twenty five years in the Indiana State Penitentiary.

THE OPINION BELOW

The opinion of the Supreme Court of Indiana is as of yet unreported. A copy of the opinion is hereto annexed in Appendix A. A Petition For Rehearing was denied as shown by Appendix B & B-1.

STATEMENT OF JURISDICTION

The decision and judgment of the Indiana Supreme Court was entered on January 9, 1968. The petitioner's Petition For Rehearing was filed on January 26, 1968 within twenty days of the Supreme Court of Indiana's decision as required by rule and it was denied on March 15, 1968.

The statutory provision believed to confer upon this Court, jurisdiction to review the judgment in question by Writ of Certiorari is Title 28, United States Code, Section 1257 (3).

QUESTIONS PRESENTED

1. Whether the directive of this Court in *Lane v. Brown*, 83 S.Ct. 768, 372 U.S. 477, 9 L.Ed.2d 892 that the Indiana pauper appeals procedure must not permit the decision of the Indiana Public Defender to be a substitute for that of the Indiana Supreme Court on the question of whether a convicted accused without funds has meritorious grounds for appeal has been fulfilled by transfering the authority to make that decision into the hands of the local pauper counsel who defended the accused at the trial.

2. Whether it is consistent with due process to presume judicially that the trial counsel for a convicted accused concluded that an appeal would have no merit on the basis of his not having filed the motion necessary to an appeal within the statutory time limit notwithstanding the fact

that the said pauper counsel filed such a motion immediately after the expiration of the absolute statutory time limit.

3. Whether it is a denial of counsel in the form of incompetence of counsel per se to file the motion necessary to an appeal after the expiration of the absolute statutory time limit and whether the pauper client of pauper counsel can be held to have waived all questions arising at the trial on the basis of the aforesaid conduct of his attorney notwithstanding the fact that it is conceivable that the same fate might befall a wealthy defendant because a wealthy or even a solvent defendant is in a position to avoid such a fate while a pauper defendant in custody and unable to make bail is not in such a position.

4. Whether it is consistent with due process for an accused to be held to have waived the question if incompetence of counsel because his allegedly incompetent counsel did not raise the question of incompetence of counsel in the motion for new trial which he filed subsequent to the absolute statutory time limit.

5. Whether a convicted accused, within the requirements of due process, can be held to have failed to exercise due dilligence in filing a belated motion for new trial when he filed it before the trial court ruled on his original motion for new trial and where the trial court neglected to rule on his original motion for new trial until fifteen months after his conviction and where the trial court granted a motion for the appointment of pauper appellate counsel 144 days after conviction but never notified pauper appellate counsel of his appointment although the petitioner was notified of the appointment and had every reason to believe that he was being represented.

6. Whether a convicted accused can be held to have failed to exercise due dilligence during a period of fifteen months in which he was in prison and prior to his obtaining private counsel through the generosity of relatives because his court appointed appellate counsel who was never notified of his appointment failed to prosecute a special appeal to the Indiana Supreme Court for the purpose of obtaining a writ of mandate under the lazy judge statute in order to procure an earlier ruling upon the original motion for new trial.

CONSTITUTIONAL PROVISIONS INVOLVED

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the United States, Amendment XIV, Section 1.

No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

In all criminal prosecutions, the accused shall enjoy the right to a speecy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

Constitution of the United States, Amendment VI.

STATUTES AND USAGES BEING QUESTIONED

Indiana Acts 1905, Ch. 169, sec. 282, p. 584 (as interpreted in recent judicial decisions)

The Court shall grant a new trial to the defendant for the following causes or any of them:

First. Irregularity in the proceedings of the court, or jury, or for any order of the court or abuse of discretio by which the defendant was prevented from having a fair trial.

Second. When the jury has separated without leave of court after returning to deliberate upon the verdict.

Third. When the jury has received and considered any evidence, paper or document not authorized by the Court.

Fourth. When the jury has been guilty of any misconduct tending to prevent a fair and due consideration of the case.

Fifth. When the verdict has been found by means other than a fair expression of opinion on the part of all the jurors.

Sixth. Accident or suprixe which ordinary prudence would not have guarded against.

Seventh. Error of law occurring at the trial.

Eighth. Newly discovered evidence, material for the

defendant which he could not with reasonable diligence, have discovered and produced at the trial.

Ninth. When the verdict of the jury or the finding of the court is contrary to law or is not sustained by sufficient evidence.

The motion for a new trial and the causes therefor shall be in writing and must be filed within thirty (30) days from the date of the verdict or finding; and any such cause not disclosed in the record shall be sustained by affidavit. The motion must be filed in open court, if the court be then in session, otherwise it shall be filed with the clerk of the court.

Indiana Supreme Court Rule 2-6, (Third Paragraph)

In all cases in which a motion for a new trial is the appropriate procedure preliminary to an appeal, such motion shall be filed and shall separately specify as grounds therefor each error relied upon however and whenever arising up to the time of the filing of such motion, and as assignment of error on appeal to the effect that the trial court erred in overruling said motion shall be the only means of raising said asserted errors on appeal. In all other cases and in cases of asserted errors arising subsequent to the filing of the motion for a new trial, such asserted errors may be assigned independently.

Indiana Supreme Court Rule 2-40 (First Paragraph)

Hereafter no court shall have jurisdiction to entertain any action for a writ of error coram nobis in any criminal case, but the remedy heretofore granted in such proceeding shall hereafter be obtained solely through a motion for a new trial in the case out of which the cause therefor is alleged to have originated. Each ground shall be separately specified in the motion for a new trial, and any ground or error not so specified shall be considered waived.

STATEMENT OF THE CASE

On March 30, 1964 the petitioner was tried by jury and found guilty of the crime of robbery on the basis of a complaining affidavit which was filed on January 15, 1962 charging him with perpetrating the said robbery on December 27, 1961. The fact that seven years elapsed between the commission of the subject robbery and the final determination of this cause on direct appeal shall be accounted for in part hereinafter in this presentation. Thirty seven days after the aforesaid conviction and seven days after the statutory maximum for filing motions for new trial a motion for new trial was filed by the petitioner's court appointed pauper trial counsel and on the same day certain motions were filed *pro se* by mail from the petitioner's place of incarceration requesting the appointment of pauper counsel for appeal and requesting a transcript of the record and submitting a technical nicety known as a "Prayer for Appeal." On April 20, 1964 the petitioner was sentenced to ten to twenty-five years imprisonment on the basis of a judgment entered the same day. The date of judgment and sentencing, however, has no significance with respect to the issues herein presented. On August 28, 1964 the petitioner's prayer for appointment of pauper appellate counsel was granted and notice of said granting was dispatched to petitioner but such notice never was dispatched to the aforesaid pauper appellate counsel and the Supreme Court of Indiana, in its decision which is set forth in Appendix A recognized this oversight to be an established fact. The decision of the Supreme Court of Indiana contains the following statement on this point:

> The record fails to indicate that Mr. Ward was ever notified of his appointment as appellate counsel and, consequently, Mr. Ward did not file an appearance or take any steps to perfect an appeal.

The next development of significance in this case occurred on July 12, 1965 when the petitioner was released on an appeal bond as a result of the financial assistance of relatives and the petitioner's present hired appellate counsel entered his appearance in this cause on or about the same date. During the fifteen months which had elapsed between the finding of guilty on March 30, 1964 and July 12, 1965 the petitioner had been incarcerated.

Then, on August 3, 1965, the petitioner, by and through his present hired counsel, filed a belated motion for new trial attached to a petition-to-file-belated-motion-for-new-trial. The belated motion for new trial never was ruled upon as the trial court denied permission to file such a motion. The only ground for such a denial under Indiana law was a finding of lack of dilligence and the Supreme Court of Indiana recognized this in its decision and it reviewed only the question of due dilligence insofar as the petitioner's belated motion for new trial was concerned. That portion of the Indiana Supreme Court's decision which deals with this point reads as follows:

> A review of the petition and the attempted showing by the appellant of diligence causes us to conclude that the Trial Court did not commit error in refusing permission to file the belated motion for new trial. The rule in this regard is set out succinctly in *Barrett v. State,* (1952), 230 Ind. 533, 105 NE 2d 508, as follows:
>
> > 'It is necessary that an appellant show, through happenings or events which have no connection with the actual trial, and which have not been brought about by the fault of the litigant, that his time for filing such motion has expired, and that, because of the happenings or events, it was impossible for him to perfect the record for an appeal. Whether or not appellant was diligent in attempting to file his mo-

> tion for a new trial is a question of fact for the trial court, subject to review by this court on appeal. The burden of proof was appellant's. He failed to sustain such burden.'
>
> The question of incompetency of trial counsel is not before this court because of the ruling of the Trial Court in refusing to grant permission to file a belated motion for new trial. The competency or incompetency of trial counsel was not presented in the original motion for new trial.
>
> *Langley v. State,* (See Appendix A)

The above-quoted appellate finding of the Indiana Supreme Court was rendered in this cause on the question of due diligence notwithstanding the fact that the petitioner had been lulled by the appointment of a pauper appellate counsel who was never notified of the appointment. The fact of this appointment or non-appointment was before the Indiana Supreme Court and noted by the court in an earlier part of its above-quoted decision herein:

> The record fails to indicate that Mr. Ward was ever notified of his appointment as appellate counsel and, consequently, Mr. Ward did not file an appearance or take any steps to perfect an appeal.
>
> Thereafter, on July 9, 1965, the attorney for appellant was privately employed by appellant and filed a petition for permission to file a belated motion for new trial. The petition for belated motion for new trial, in substance, alleged that the motion for new trial previously filed was inadequate; that the appellant was not adequately represented in his trial in the Criminal Court of Marion County; and that the appellant had been diligent in attempting to determine his Constitutional Rights, but that he was without sufficient technical knowledge, pro se, to make an adequate judgment concerning his rights.
>
> *Langley v. State,* (See Appendix A)

Although, for reasons which are not clear, the Indiana Supreme Court saw fit to set forth in full in its decision the petitioner's pro se motion for appointment of pauper counsel on appeal even though it made no comment on its contents but the above quoted sentence describing the petitioner's Belated Motion For New Trial as merely alleging that his representation was inadequate is all of the notice which the Court's decision takes as to the contents of the said belated motion. The petitioner's Belated Motion For New Trial is set forth in full hereinafter in Appendix C. Its most pertinent portion reads as follows:

> (2) Said court appointed attorney failed, neglected and refused to permit the two co-defendants to testify, namely, Edward Moore and Theron Jackman as witnesses for the defendant in this case, the defendant having evidenced his desire to have them so testify and they have agreed so to do; their evidence being relative and material to testimony to prove that defendant was not guilty of the crime of robbery charged herein and
>
> (3) Said court appointed attorney failed, neglected and refused to confer with and interrogate the aforesaid two co-defendants to corroborate, ascertain and develop, evaluate and determine their testimony with reference to the non-participation of the defendant in said crime so as to enable defense and counsel to properly prepare a defense thereon:
>
> (5) Said court appointed attorney, by his failure to call as defense witnesses the aforesaid two co-defendants, inadvertently suppressed evidence favorable to the defendant and thus deprived the defendant of the opportunity to prove and show to the jury that the two co-defendants, who actually perpetrated the crime, received a much lighter sentence than did the defendant herein, who was not an active participant in said crime, but who nevertheless was being charged with, and was being tried on, and was found guilty of, a

much greater offense, two-wit, robbery, which carried an indeterminate sentence of ten to twenty-five years.

(b) Newly discovered evidence, material for the defendant, which he could not with reasonable diligence have discovered at the trial, all of which is set out herein by an affidavit of the co-defendant and which is attached hereto and made a part hereof, and for identification, marked "Exhibit A."

AFFIDAVIT

I, Edward Moore, being duly sworn upon oath, depose and say:

That on the night of December 27, 1961, Theron Jackman, Ernest Langley, his wife and I were stopped while driving in an automobile at 38th and Fall Creek Parkway, Indianapolis, Indiana by members of the Indiana (sic) Police Department, who, then took us to a Service Station at 40th and Keystone, where an alleged robbery had occured. We were told to get out of the automobile and line up for viewing by the Service Station attendant to see if he could identify any of us as having been the persons that allegedly robbed him. At this time, he indicated, by pointing his finger at Theron Jackman and myself, and stating: "These two men were the ones that robbed me. I have never seen this other man and woman."

Due to a malfunction of the carburetor of the car we were riding in, we stopped in front of this Service Station on the street, and while Ernest Langley had the hood of the car in a raised position and was working on the carburator, Theron Jackman and I said we were going to the restroom or words to that effect. Theron Jackman and I robbed the attendant, taped him up, and then returned to the car which had been repaired by that time, and told Ernest Langley: 'Let's get out of here.' We were stopped just a short distance from the Service Station by Officers of the Indianapolis Police Department.

> In May of 1964, Theron Jackman and I were returned from the Indiana State Prison to the Marion County Jail in Indianapolis, Indiana to appear as witnesses for Ernest Langley at his trial. While waiting in the court room to be called as a witness for the State, a deputy prosecutor and a detective came and asked me how I was going to testify, if I was going to tell the truth or not? I answered: 'That I certainly would, as I did not want a charge of perjury brought against me on top of what I already had.' Then they asked me several questions about the robbery and Ernest's connection with it. When I had answered these questions, they said something about this hurting their case, so they were going to send Jackman and I back to jail until after this trial was over; this was done immediately and we were therefore prevented from testifying at Langley's trial.
>
> I would like to make it clear that Ernest Langley had not been on the property where the Service Station is located, during the night of December 27, 1961, until we were returned there by the Officers of the Indiana Police Department. Also, at this time, the attendant did not identify said Ernest Langley or his wife. (See Appendix C)

Stating that it was acting "in the interest of putting this matter at rest" the Indiana Supreme Court, after holding that the question of incompetence of counsel had not been preserved because the allegedly incompetent counsel did not allege incompetence in the original motion for new trial, went on to comment on the merits of the petitioner's allegations of incompetence insofar as those allegations related to matters of record at the trial and it "found" that the petitioner was merely engaging in "Monday morning quarterbacking" with respect to matters of trial strategy in his allegations of incompetence. The petitioner's present counsel is not inclined to quarrel with the

Indiana Supreme Court's characterization of the petitioner's allegations of incompetence insofar as they related to matters of record but the fact remains that the most serious allegations of incompetence, those which appear in the above-quoted portion of the petitioner's Belated Motion For A New Trial were not matters of record and were not before the Supreme Court of Indiana because the trial court had denied the petitioner a hearing on those allegations.

The decision of the Indiana Supreme Court, although it purported to dispose of the petitioner's allegations on the merits notwithstanding the "infirmities" of his appeal, entirely begged the question by declining to go into the matter involving the denial of a hearing on the petitioner's Belated Motion For New Trial in which he alleged that his court appointed trial attorney had refused to subpoena and had refused to interview after the state had subpoened the petitioner's two alleged co-robbers one of whom had since sworn to the affidavit to the effect that he was subpoened by the state and interviewed only by the state at the courthouse and then sent back to prison after he had indicated to the state's agents that he would testify that the petitioner was not involved in the subject robbery. The Indiana Supreme Court's decision also begged the question involved in the fact that the petitioner's pauper trial counsel had filed the petitioner's original motion for new trial seven days after the absolute statutory deadline. This omission on the part of the petitioner's pauper appellate counsel is particularly significant as is the fact that the Indiana Supreme Court declined to discuss the matter in its decision because the presumption that "competent counsel" will file a proper motion for new trial where there are grounds for new trial or appeal has become the bedrock of the Indiana pauper appeals system since

this Court's decision in *Lane v. Brown,* 372 U. S. 477, 83 S. Ct. 768, 9 L. Ed. 2d 892 (1963). In order to fully present the matters herein being complained of in their proper context it is necessary to dwell at some length on the peculiar system of pauper appeals which the Indiana Supreme Court has developed since the decision of this Court in *Lane v. Brown,* supra, because it is only in this context that the impropriety of the post conviction proceedings in the petitioner's case can be demonstrated for purposes of proper evaluation by this Court.

The pertinent holding in *Lane v. Brown,* supra, with respect to the propriety of Indiana's then current pauper-post-conviction remedies reads as follows:

> In Eskridge the Court held constitutionally invalid a provision which permitted a trial judge to prevent an indigent from taking an effective appeal. The provision before us confers upon a state officer outside the judicial system power to take from an indigent all hope of any appeal at all. Such a procedure, based on indigency alone, does not meet constitutional standards. (footnote: We do not deal here with a preliminary screening procedure applicable alike to all coram nobis appeals. Nor need we determine in this case what procedural measures Indiana might constitutionally take to reduce the public expense of indigents' appeals. See Griffin v. Illinois, 351 US, at 20.) We have no doubt that Indiana, with its historic concern for equal justice under law, will find no practical difficulty in correcting the constitutional deficiency which this case exposes.
>
> *Lane v. Brown,* 372 U. S. 477, 485, 83 S. Ct. 768, 9 L. Ed. 2d 892, 897, 898 (1963)

As a result of the above-quoted holding the Indiana Supreme Court adopted a pauper-appellate procedure which must and will be described in more detail herein-

after. Suffice it to say at this point that the effect of this procedure was to expand the infirmities found in *Lane v. Brown* which applied only to post-appeal collateral attacks by indigents to apply as well to indigent defendants seeking a direct appeal. The unconscionable discretion which was vested in the state public defender prior to *Lane v. Brown* has since been vested in pauper trial counsel and pauper trial counsel now is the equivalent of the Supreme Court of Indiana insofar as any indigent who seeks a direct appeal is concerned. This development is in direct contravention of the following statement which appeared in the separate opinion in *Lane v. Brown:*

> I think it falls short of the requirements of due process for a State to foreclose an indigent from appealing in a case such as this at the unreviewable discretion of a Public Defender by whom, or by whose office, the indigent has been represented at the trial. It ignores the human equation not to recognize the possibility that a Public Defender so circumstanced may decide not to appeal questions which a lawyer who has had no previous connection with the case might consider worthy of appellate review. (I do not of course remotely intimate that such is the situation here.)
>
> Were it clear that the decision of this Public Defender not to appeal had been subject to judicial review at the instance of the prisoner, I should have voted to sustain this conviction. However, the State Attorney General has candidly informed us that the Indiana law is unclear on this score.
>
> *Lane v. Brown,* supra, 372 U. S. at 485, 486, 9 L. Ed. 2d at 898.

The above-quoted separate opinion was mistaken insofar as it expressed the belief that the State of Indiana's Public Defender had some connection with the pauper

counsel who defended Brown at his trial. There never has been any connection between the State of Indiana's Public Defender who is appointed under the Indiana Supreme Court's political patronage and local pauper trial counsel or pauper appeals counsel who are appointed under the trial court's political patronage. (The State Public Defender handles belated appeals and collateral attacks only.)

But the thrust of the separate opinion in *Lane v. Brown* is nonetheless important notwithstanding its mistake as to the facts because the suggestion embodied in that separate opinion, that trial counsel probably is the poorest judge as to whether an appeal should be taken and the poorest judge as to what questions, if any, should be presented on appeal represents the exact opposite philosophy that has been embodied in the pauper-appellate procedures which the Indiana Supreme Court has developed since *Lane v. Brown*. The Indiana Supreme Court, by its Supreme Court Rules and by its decisions has created the presumption that any possible appellate questions, however much they may involve a violation of fundamental rights, are to be deemed waived by a convicted accused unless they are presented with exactitude in a Motion for new trial within thirty days after conviction and such a waiver is to be presumed because it is further presumed that competent trial counsel will file an adequate motion for new trial if such a motion is appropriate. This approach to the problem is entirely contrary to the doctrine of implied waiver which was expressed in this Court's opinion in *Fay v. Noia* which was decided the same day as *Lane v. Brown:*

> The classic definition of waiver enunciated in *Johnson v. Zerbst,* 304 U. S. 458, 464, 82 L. Ed. 1461, 1466, 58 S. Ct. 1019, 146 ALR 357,—'an intentional relinquishment or abandonment of a known right or privilege'—furnishes the controlling standard. If a habeas applicant, after consultation with competent counsel or

> otherwise, understandingly and knowingly forwent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits.
>
> *Fay v. Noia,* 372 U. S. 391, 439, 83 S. Ct. 822, 9 L. ed. 2d 837, 869 (1963).

Contrary to the manifest dictates in *Fay v. Noia* the doctrine of "implied waiver" has become almost the sole device by which pauper-appeals in Indiana are screened and contrary to the manifest dictates of the above-quoted separate opinion in *Lane v. Brown* this screening process takes place as an automatic result of the action or inaction of pauper trial counsel.

The petitioner's opportunity to obtain a review of his criminal conviction on direct appeal was greatly diminished by two factors which were beyond the control of petitioner and which had no rational connection with the validity or invalidity of petitioner's cause. The appellate procedure of the State of Indiana denies equal protection of the law to pauper defendants.

Indiana Acts 1905, Ch. 169, sec. 282, p. 584 provides that errors of law occuring at a trial may be considered on appeal only if they are cited in writing in a motion for new trial which must be filed in the trial court within thirty days after the verdict or finding. The Indiana Supreme Court has held that an appellate question arising from an "error of law occurring at the trial" can be preserved for appeal only if the question asked the witness, the answer given, the objection made and the ruling of the trial court is presented in the motion for new trial

with near word for word accuracy. For example, the following citations of error in a motion for new trial have been held to be so general and vague as to present no question for appeal whatsoever:

> "3. Error of law occurring at the trial in this, to wit, that the Court permitted in evidence a picture of the defendant over the objection of the defendant at the time of the trial.
>
> 4. Error of law occurring at the trial in this, to wit, court permitted witness Surgeon (spurgeon (Spurgeon) Davenport to answer certain questions asked by the prosecuting attorney concerning certain receipts alleged to be the property of the defendant over the objection of the defendant at the trial in violation of the defendant's constitutional rights.
>
> *Triggs v. State,* 238 Ind. 260, 262, 149 NE 2d 545 (1957).

The Indiana Supreme Court has further held that the purpose of the motion for new trial is to give the trial judge the opportunity to review his own rulings before he becomes subject to reversal on appeal:

> This is no technical rule, but a rule which has its roots in sound reason. The purpose of setting out specifically the reason why a new trial should be granted, is to inform the trial court of the various complaints relied upon by the applicant for a new trial and to call the same to the attention of the court for a review, and to afford it an opportunity to correct any error complained of. We must assume that the court below considered appellants motion for a new trial as it was presented by the record and governed itself by the rule of law above mentioned.
>
> *Hamilton v. State,* 207 Ind. 97, 105, 190 NE 2d 870 (1934).

This courtesy to the trial judge is deemed necessary by the Indiana Supreme Court in spite of the fact that "errors of law occurring at the trial" necessarily take place in the presence of the trial judge and he is deemed to have notice of everything which occurs in his presence.

It also has been held by the Indiana Supreme Court that a trial judge shall not have jurisdiction to grant a new trial on the basis of any grounds submitted to him after the thirty days have expired and that he may grant no continuances for the filing of a motion for new trial nor permit any amendment to grounds submitted prior to the expiration date if the amendment is presented after the expiration date.

> A court has no authority to grant an extension of time for filing a motion for new trial based only on alleged errors shown within the record.
>
> *Barker v. State,* 244 Ind. 267, 191 NE 2d 9 (1963).
>
> The right to file a motion for a new trial is conferred by statute. *Webster v. State,* (1935), 209 Ind. 274, 275, 198 NE 781. There is no statutory provision for the filing of a supplemental or subsequent motion after the period of time allowed by statute. *Morton v. State,* (1935) 209 Ind. 159, 198 NE 307; nor does any such right exist at common law, *Webster v. State,* supra. Since appellant's petition was for the granting of the right to file a subsequent (second) motion for a new trial and there is no statutory provision for such proceeding, the Marion Circuit Court was without jurisdiction to grant the remedy sought.
>
> *Blanton v. State,* 234 Ind. 142, 124 NE 383, 384.

There is an obvious anomaly in the fact that the motion for new trial is at one and the same time considered a courtesy to the trial judge enabling him to reconsider his

handling of the trial before his being subjected to reversal on appeal and considered as a statutory creation which limits a trial judge's discretion to grant a new trial in the interests of justice.

In any case, these rules of law have serious implications for the pauper accused. The protection which an accused who is not a pauper can anticipate under these rules must be regarded as different in kind from that afforded an accused of lesser means.

Where an accused is convicted after a trial which included a large number of questionable rulings by the trial court he is faced with the task of obtaining a transcript of these rulings and the testimony surrounding them within thirty days of the verdict or finding. If the accused is in jail during the entire thirty days following his conviction, as was the case with the petitoner herein, there is no possibility that he can have a proper and meanngful appeal as he must look only to himself in drafting his Motion For New Trial if his pauper counsel has concluded that there are no grounds for appeal. He cannot seek other pauper counsel because his right to trial counsel at public expense is considered by the Indiana courts to be at an end and pauper appellate counsel are not appointed until a prayer for appeal has been filed and prayers for appeal may not be filed until there is something to appeal from and the only ruling that can be appealed from under Indiana law (with certain very rare exceptions) is the overruling of a Motion For New Trial. Thus the pauper convicted accused who is in jail during the thirty days that immediately follow his conviction is faced with overcoming the impossible legal intricacies which go with the drafting of a Moton For New Trial (which the accused has no means of learning about) and he has the equally

impossible task of procuring a verbatim transcript of all of the pertinent parts of his trial or he is deemed to have "waived" all of the errors contained therein.

The Indiana Supreme Court has taken notice of this difficulty and it has suggested only the following as a solution:

> As judges, who as lawyers have engaged in trial work, we know that competent trial counsel can, should and will make adequate notes and memoranda during trial for use in preparing a motion for a new trial.
>
> *State ex rel. Macon v. Orange Circuit Court,* —Ind.—, 198, NE 2d 229 (1964).

In *Griffin v. Illinois,* infra, this Court uttered a very simple, straight-forward pronouncement of law which can be applied to the problem presented in the present case:

> "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."
>
> *Griffin v. Illinois,* 351 U. S. 12, 100 L. Ed 891, 76 S. Ct. 585, 591.

The *Griffin* case produced the rule that where a state affords appellate review of criminal convictions and where a transcript of the proceeding is essential to an appeal, an indigent accused must have the same opportunity to obtain a transcript that is afforded a solvent accused. It should be noted that the above-quoted portion of the *Griffin* decision tacitly held that an accused's appellate opportunities will affect the fairness of his trial. It is, of course, obvious that the degree of care which a trial judge will exercise in handling questions which arise at a trial will be affected by the likelihood that the accused will succeed in presenting the question to a higher court.

In *Douglas v. California,* the matter in question in the *Griffin* case was discussed somewhat further to the following effect:

> "The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal."
>
> *Douglas v. California,* 83 S. Ct. 814, 372 U. S. 353, 9 L. Ed. 2d 811

It would be difficult to imagine a more meaningless opportunity to appeal than one which makes it necessary for an indigent accused to waive everything which he does not manage to allege with all of the technical nicities in a pro se motion for new trial.

The general question being presented herein was considered by the Indiana Supreme Court three years ago in its reconsideration of *State ex rel Macon v. Orange Circuit Court* on remand from this Court. This Court remanded the *Macon* case in the light of *Lane v. Brown,* supra, which had applied the *Griffin v. Illinois* doctrine to Indiana's particular appeals system. The *Macon* case presented the question of whether the appellant could be regarded as having waived questions presented by the rulings at the trial by reason of the fact that they had not been recited in a motion for a new trial and presented within thirty days after the verdict. The Indiana Supreme Court had this to say:

> . . . a pauper and a rich man alike are bound in this state by the action or non-action of competent trial counsel. So far as we can find, that principle is true in federal courts if there is a failure to file a motion for a new trial within five (5) days and no request is made within such time to file a belated motion as to matters occurring during the trial.

> . . . We do not believe the United States Supreme Court is deliberately imposing a double standard on state and federal courts in regard to the requirements of a transcript and the appointment of counsel in every case when a belated motion for a new trial (or writ of error coram nobis) is requested in a criminal case, particularly when no motion was filed within the liberal period of thirty (30) days in Indiana, compared to five (5) days under the rules approved for federal trial courts.
>
> *State ex rel Macon v. Orange Cir. Ct.* supra at p. 230.

In the same *Macon* decision the Indiana Supreme Court went on to consider the practical difficulties of preserving errors in the motion for new trial and it suggested the solution cited above in the first quote from the *Macon* case, namely, that presumably competent trial counsel would file a proper for new trial and the absence of such a filing would give rise to the presumption that presumably competent counsel presumably found no grounds for appeal (and, perhaps, that presumably competent counsel was presumably competent because he didn't file a motion for new trial alleging his own incompetence.)

The Indiana Supreme Court's interesting analogy in *State ex rel Macon v. Orange Circuit Court,* supra, with respect to the 5 day limit that prevails with the federal motion for new trial is not well taken for obvious reasons. The actual method of perfecting federal appeals is precisely what the petitioner is arguing should prevail in all courts to the extent of avoiding all resort to questionable implied waiver doctrines in screening the flow of appeals. No appellate procedure which is rife with implied waiver theories applying to even the most fundamental of rights can afford equal protection of the law.

It would appear from another Indiana Supreme Court decision that the court's misunderstanding of federal procedure is a matter of antipathy and not mere apathy:

> The history of the Irvin case reveals the United States Supreme Court performing the function of a trial court rather than a court of appeals. Because of its violation of the principles of appellate review, such a decision can have no weight as precedent.
>
> *Baker v. State,* — Ind. —, 195 N.E. 2d 91 (1964).

By the Indiana Supreme Court's decision in the *Macon* case and in petitioner's case it is showing the same intention of circumventing *Lane v. Brown* that it demonstrated with respect to *Irvin v. Dowd* in the above quoted decision.

As for the rationale expressed in the *Macon* case, that "a pauper and rich man alike are bound in this state by the action or non-action of competent trial counsel," this is like saying that the rich and the poor are equally entitled to lay down under a viaduct and die of starvation. The Indiana Supreme Court's concept includes no consideration of the fact that the rich man or even the man of modest means who is not a pauper can hire another attorney if he is not inclined to accept his trial counsel's conclusion that an appeal would have no merit. For the pauper defendant there is no such recourse and the opinion of his court appointed trial counsel must be accepted as a substitute for a decision of the Indiana Supreme Court just as convicted pauper defendants formerly had to accept the decision of the State of Indiana's Public Defender as such a substitute prior to *Lane v. Brown.*

The foregoing legal rationale and pauper appellate system which was developed by the Indiana Supreme Court subsequent to *Lane v. Brown* suffered a breakdown in this

case as the petitioner's pauper trial counsel "presumably" concluded that an appeal would have no merit because he filed no motion for new trial within thirty days and then spoiled the whole presumption by filing a motion for new trial after the absolute time limit of thirty days had expired.

In *Sparks v. State*, — Ind. —, 196 N. E. 2d 748 (1964) the Indiana Supreme Court, in light of the *Lane v. Brown* decision had awarded a new trial upon rehearing when it was pointed out in a pro se petition for rehearing that Spark's pauper trial counsel presumably had decided that an appeal would have no merit by failing to file a Motion For New Trial yet he had been appointed pauper appellate counsel and had undertaken the appeal after it had been initiated by a pro se motion for new trial which was filed within the time limit. A new trial instead of merely a new appeal was awarded Sparks, apparently because the Indiana Supreme Court considered the 30 day time limit for preserving questions to be raised on appeal as such an absolute that a new appeal would not be awarded without first having a new trial. *Sparks v. State* was very analogous to this case as presented before the Indiana Supreme Court because here again a convicted defendant's pauper counsel undertook the prosecution of an appeal for the accused after presumably reaching the conclusion that an appeal would have no merit by not filing the necessary motion for new trial within the necessary thirty days. The aforesaid anomoly was vigorously and specifically brought to the attention of the Indiana Supreme Court in the petitioner's Appellant's Brief but the matter was simply ignored by the Indiana Supreme Court in its decision except for the previously mentioned general comments to the effect that the appellant was engaging in Monday morning quarterbacking of his trial counsel. If certiorari is granted

in this cause the record will show that the following argument was presented to the Indiana Supreme Court and it met with the following resolution in the Indiana Supreme Court's decision:

> The Appellant's trial Counsel's demonstration of his general incompetence occurred on May 7, 1964, thirty seven days after the verdict was returned in this cause, when he filed a Motion For New Trial which stated that he was of the opinion that the evidence in this cause was not sufficient to sustain his client's conviction and in which he stated further, in effect, that it had taken him thirty seven days to reach this conclusion.

The following portion of Indiana Acts 1905, ch. 169, sec. 282, p. 584, is known to every competent lawyer in the State of Indiana:

> The motion for a new trial and the causes therefor shall be in writing and must be filed within thirty (30) days from the date of the verdict or finding; and any such causes not disclosed in the record shall be sustained by affidavit. The motion must be filed in open court, if the court be then in session; otherwise, it shall be filed with the Clerk of the Court.
>
> Acts 1905, ch. 169, sec. 282, p. 584.

Also known to every competent counsel in the State of Indiana is that portion of Supreme Court Rule 2-40 which reads as follows:

> Trial counsel representing a defendant or the defendant pro se shall, in all cases where meritorious grounds exist therefor, file a motion for new trial within the time prescribed by the rules of this Court. If no timely motion for a new trial is filed by a defendant's trial counsel or by the defendant pro se, it may be considered as evidence by the Court that no meritorious grounds exist for a new trial or for an appeal, or if any meritorious grounds did exist,

there is an acquiescence in, and an acceptance of, the judgment of the trial court by the defendant.

Supreme Court Rules, West Publishing Co. Edition, Page 49.

With reference to the duties of pauper trial counsel the intended effect of the above-quoted Supreme Court Rule was further delineated by this Court in *Sparks v. State,* infra:

Compensation for court-appointed counsel in pauper cases should not be approved by the trial judge until such court appointed counsel has fully performed his duties. This includes the filing of a motion for a new trial in a criminal case, or a showing to the satisfaction of the trial court that his client has waived the filing of such a motion and an appeal, or that counsel finds no merit which he can, in good faith support in the filing of a motion for new trial, all of which showing should be put in the record.

Sparks v. State, (1964) — Ind. —, 196 NE 2d; 748, 751.

The conduct of the Appellant's pauper trial counsel in this case together with the above-quoted statute, Supreme Court Rule and case authority permit only a limited number of inferences to be drawn. From the fact that the Appellant's pauper trial counsel did file a Motion For New Trial it can be inferred only that he did believe that the Appellant had grounds for appeal. From the fact of this appeal it can only be inferred that the appellant has not and never intended to acquiesce in the decision reached at his trial. From the fact that the Appellant's pauper trial counsel failed to file the Motion For New Trial within the well known time limitation one can only infer general incompetence of trial counsel.

Petitioner's Appellant's Brief, pgs. 66-68.

The second guessing of the trial counsel by appellant's present counsel amounts to "Monday morning quarter-

> backing". The transcript including the bill of exceptions indicates to this Court that appellant's trial counsel did his work creditably under difficult circumstances.
>
> Decision, pgs. 7, 8 (See Appendix A).

The Indiana Supreme Court's decision contains no explanation as to how it can constitute "second guessing" to assert that trial counsel should not have filed a motion necessary to an appeal one week after the well known absolute statutory time limit or how it can constitute "second guessing" to assert that he should have at least interviewed the alleged co-robbers before trial as the petitioner insisted.

At the time of its decision in this cause, the Indiana Supreme Court had before it on its own public record, another instance of gross incompetence by the same pauper counsel involved in this case before the same trial judge who heard petitioner's case:

> Issue number two presents a far more serious question. Appellant contends that he was coerced by the trial court into waiving his constitutional right to trial by jury. At the beginning of the trial appellant asked the court for a change of venue, and after denial of the change of venue, asked for a jury trial. Although pauper counsel, appointed by the court to represent appellant, was in court at the time the requests were made, the appellant himself orally made the requests to the court. The record shows the following exchanges:
>
> THE COURT: This is CR-251, the State of Indiana versus Glenn Ford and Michael George Snow charged jointly with first degree burglary.
>
> MR. MAY: Judge, I have talked to Mr. Ford again this morning, and I'm still not certain in my own mind what he really wants to do. You tell the judge what you want to do now, Ford.

. . . . . .

DEFENDANT FORD: Your honor, I would like to have a jury trial.

THE COURT: All right, but let me give you a little word of warning of something you may not know about. How old are you?

DEFENDANT FORD: Twenty-two.

THE COURT: Whenever a case is tried in this court and the defendant is of your age, and depending upon his record of past offenses, if he is found guilty, there is a certain tendancy to review his case on a presentence investigation and then decide what he should or shouldn't receive in the form of a sentence. However, when a case is tried to a jury and twelve people over in that box come in, if they find you guilty, I never disturb their verdict. What they say you are going to get is what I give you. Now, with that in mind, is a jury trial what you want? It is your constitutional right, I don't want to confuse you about that at all. If you say you want a jury trial, why you will get one.

DEFENDANT FORD: I will have trial here, then.

THE COURT: What did you say?

DEFENDANT FORD: I will have trial here.

THE COURT: I can't hear you.

DEFENDANT FORD: I will have trial here, sir.

THE COURT: All right, be seated.

Ford v. State, 11 Indiana Decisions 208, 210, 211 (1967).

Yet the Indiana Supreme Court, by its decision in this cause, upheld the trial judge's refusal to permit the petitioner to have a hearing on his Belated Motion For New Trial in this cause (coram nobis) concerning his pauper

counsel's refusal to interview two obviously pertinent witnesses on the grounds that the petitioner had not been diligent notwithstanding the fact that the petitioner during the entire period prior to the filing of his Belated Motion For New Trial was represented either by his allegedly incompetent pauper trial counsel or by pauper appellate counsel who had been appointed but not notified, and, notwithstanding the fact that it had notice of collusion between the same pauper counsel and the same trial judge in derrogation of defendants' rights in the matter which had come to its attention in the above-cited *Ford* case.

CONCLUSION

For the reasons above stated, especially by the Indiana Supreme Court's pronouncement that petitioner has "waived" fundamental rights and failed to exercise due diligence while he was helpless in prison and represented by either allegedly incompetent appointed counsel or by undisputably unnotified appointed counsel, this petitioner has been denied his constitutional rights to a fair, impartial and legal proceeding during and after his trial and on his appeal.

It is therefore respectfully submitted that Certiorari should be granted and that the decision of the Indiana Supreme Court should be reversed, or in the alternative, that this Court should vacate said judgment and remand this cause to the Indiana Supreme Court for further proceedings not inconsistent with an appropriate opinion.

Respectfully submitted,

WILLIAM C. ERBECKER,
Attorney for Petitioner.

APPENDIX A

ATTORNEY FOR APPELLANT:

William C. Erbecker
1005 Lemcke Building
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

John J. Dillon
Attorney General of Indiana

Murray West
Deputy Attorney General

219 State House
Indianapolis, Indiana

IN THE

SUPREME COURT OF INDIANA

ERNEST CLIFTON LANGLEY,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	No. 30893
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE MARION CRIMINAL COURT, DIVISION 1

Hon. Eugene M. Fife, Jr., Judge

LEWIS, C.J.

The appellant was convicted of the crime of robbery in the Criminal Court of Marion County, Indiana, Division 1. Appellant was sentenced to a term of not less than ten (10) years nor more than twenty five (25) years in the Indiana State Penitentiary.

The trial was before a jury. Thereafter, a motion for new trial was filed claiming the following errors:

(1) The verdict of the jury is not sustained by sufficient evidence.

(2) The verdict of the jury is contrary to law.

The motion for new trial was overruled and appellant filed a motion for the appointment of appellant counsel. The Motion for Appointment of Counsel reads as follows:

"Comes now ERNEST LANGLEY, the defendant in the above cause, and respectfully moves the Court to appoint some competent attorney to aid, assist and represent the defendant in the preparation and prosecution of an appeal to the Indiana Supreme Court from the judgment against defendant in this cause, in all of the following, to-wit:

1. That defendant was tried in the above Court and cause and, on March 30, 1964, was found guilty by a jury of the offense of Robbery, and thereafter, on April 20, 1964, was sentenced to be imprisoned for a term of 10 to 25 years; and that the defendant is presently imprisoned pursuant to said judgment.

2. That defendant desires to perfect an appeal to the Indiana Supreme Court from the judgment against him in this cause, in that he verily believes and avers that the record in this cause manifests multiple denials to defendant of his substantial rights secured by Article 1, Sections 12, 13 and 16, Indiana Constitution, and the 14th Amendment to the United States Constitu-

tion, by which said judgment became and now remains void, and that defendant's conviction in this cause will be reversed by the Indiana Supreme Court.

3. That the defendant is without the requisite skill and knowledge to properly prepare and prosecute said appeal, in that he is a mere layman without any training in law and is wholly incapable of perfecting said appeal without the assistance of counsel.

4. That the defendant is without funds, means or credit with which to retain private counsel to represent him in the preparation and prosecution of an appeal in this cause.

WHEREFORE, the defendant respectfully moves the Court to appoint some competent attorney to represent defendant in perfecting his appeal in this cause to the Indiana Supreme Court, said attorney to be compensated therefor at public expense."

Thereafter, the Court entered the following Order:

"Comes now the defendant in the above-entitled cause (CR 25183-Y) and filed with the Court their joint and several petitions for counsel and a transcript of the record for the purpose of appealing their convictions in forma pauperis.

And the Court having read said petitions and being duly advised the Court now appoints Palmer K. Ward, member of the Bar, as counsel for the purposes of taking said appeal. The Court orders furnished transcript.

All until further order of the Court.

/s/ Eugene M. Fife, Jr.
Eugene M. Fife, Jr.

Dated at Indianapolis, Indiana, this 28th day of Aug.. 1964."

The record fails to indicate that Mr. Ward was ever notified of his appointment as appellate counsel and, consequently, Mr. Ward did not file an appearance or take any steps to perfect an appeal.

Thereafter, on July 9, 1965, the attorney for appellant was privately employed by appellant and filed a petition for permission to file a belated motion for new trial. The petition for belated motion for new trial, in substance, alleged that the motion for new trial previously filed was inadequate; that the appellant was not adequately represented in his trial in the Criminal Court of Marion County; and that the appellant had been diligent in attempting to determine his Constitutional Rights, but that he was without sufficient technical knowledge, pro se, to make an adequate judgment concerning his rights.

The appellant further alleges that the provision in Rule 2-40 and 2-40A of this Court (Supreme Court Rules, 1964), which require due diligence in asserting and taking advantage of the post-conviction remedies contained therein, is unconstitutional. The Trial Court denied appellant's petition for permission to file his belated motion for new trial and appellant now assigns as errors:

(1) The Trial Court erred in overruling his original Motion for New Trial.

(2) The Trial Court erred in not affording the appellant equal protection of the law by the appointment of competent counsel.

(3) The Trial Court erred in refusing the Appellant permission to file his Tendered Belated Motion for New Trial and in overruling his Verified Petition for Permission to File Belated Motion for New Trial.

(4) The Trial Court erred by failing to rule on the appellant's original Motion for New Trial for more than one year after it was filed.

The evidence most favorable to the State is as follows: A filling-station attendant testified that on the 27th day of December, 1961, he was held up while he was at work; that he was put in fear by one of the holdup men putting a gun in his back and demanding money. One of the other individuals engaged in the holdup took the money from the drawer and then the filling-station attendant was bound and gagged and placed in a backroom.

The statute on robbery, Burns' Indiana Statutes, Anno., §10-4101, (1956 Repl.), reads, in part, as follows:

> "* * * Whoever takes from the person of another any article of value by violence or by putting in fear, is guilty of robbery, and on conviction shall be imprisoned not less than ten [10] years nor more than twenty-five [25] years, and be disfranchised and rendered incapable of holding any office of trust or profit for any determinate period. * * *"

The appellant was one of three men involved in the filling-station holdup. The appellant was the driver of a car and the other two men actually committed the physical acts of pulling the gun and taking the money. The police officers testified that shortly after the robbery they stopped the appellant driving the motor vehicle which had been used as the "get-away" car and the appellant was driving. A search of the car revealed weapons and friction tape. Friction tape had been used to bind the filling-station operator. The appellant admitted to the police officers that he had driven the car at the time of the robbery and gave as his only excuse that he had been drinking with the other two men and appellant's wife and that they had run out of

money and liquor and had decided to go get some more money. Later he claimed that when his two "friends" entered the filling station he didn't know that they were going in for the purpose of robbing the station.

The only essential difference between the States theory of the commission of this crime and the appellant's theory is the State's contention that all of the appellant's actions before, during and after the actual robbery indicate and prove the substantial evidence that appellant was a participant. The appellant contends that he did not have advance knowledge of the robbery and that he was the innocent victim of the impetuous act of his two companions. Suffice it to say that appellant testified before the jury and gave his whole version of the commission of the happenings on the night in question. The jury chose to adopt the State's arguments concerning the evidence on the happenings at the time of the participating of the appellant in the robbery.

When the question of the sufficiency of the evidence is raised, this Court will consider only that evidence which is more favorable to the State. *Wagner v. State* (1963), 243 Ind. 570, 188 N. E. 2d 914. We have said on a number of occasions that this Court cannot weigh the evidence but will consider only the evidence most favorable to the State, and the reasonable inferences that may be drawn therefrom, to determine whether the jury was warranted in returning a verdict of guilty. *Gilmore v. State* (1951), 229 Ind. 359, 98 N. E. 2d 677. *Flowers v. State* (1956), 236 Ind. 151, 139 N. E. 2d 185.

The uncontradicted evidence shows that appellant was the driver of the car that took the active participants in the holdup to the filling station; that appellant waited for the participants until the holdup was consummated and

then drove them away. The evidence indicated appellant was without funds prior to the holdup and that after the holdup the officers found some $8.00 on appellant which was approximately one-third of the proceeds of the robbery. It is quite evident that the jury did not believe appellant when he testified that he did not know that his companions entered the filling station for the purpose of robbery. There was substantial evidence to prove each and every material allegation of the affidavit against appellant and there was sufficient evidence of each and every material allegation to sustain the conviction.

We conclude that the Trial Court did not commit error in refusing permission for appellant to file a belated motion for new trial.

Rule 2-40 provides as a condition precedent to granting permission to file a belated motion, the following:

> "* * * The court, upon finding *substantial evidence of such facts,* and that the movant acted as promptly as reasonably possible, shall approve the filing of said belated motion for a new trial." (Our Emphasis)

A review of the petition and the attempted showing by the appellant of diligence causes us to conclude that the Trial Court did not commit error in refusing permission to file the belated motion for new trial. The rule in this regard is set out succinctly in *Barrett v. State* (1952), 230 Ind. 533, 105 N. E. 2d 508, as follows:

> "It is necessary that an appellant show, through happenings or events which have no connection with the actual trial, and which have not been brought about by the fault of the litigant, that his time for filing such motion has expired, and that, because of the happenings or events, it was impossible for him to perfect the record for an appeal. Whether or not appellant was diligent in attempting to file his motion for a new

trial is a question of fact for the trial court. The determination of whether diligence has been established rests in the sound discretion of the trial court, subject to review by this court on appeal. The burden of proof was appellant's. He failed to sustain such burden." (Cites in above quote omitted.)

The question of incompetency of trial counsel is not before this court because of the ruling of the Trial Court in refusing to grant permission to file a belated motion for new trial. The competency or incompetency of trial counsel was not presented in the original motion for new trial. However, in the interest of putting this matter at rest, we have reviewed the record in an effort to determine whether or not appellant's Constitutional Rights were denied by the Court failing to provide appellant with competent trial counsel.

The second guessing of the trial counsel by appellant's present counsel amounts to "Monday morning quarterbacking". The transcript including the bill of exceptions indicates to this Court that appellant's trial counsel did his work creditably under difficult circumstances. Appellant now contends that his trial counsel failed to object to certain questions and failed to cross-examine on certain questions. A difference in strategy between attorneys does not make one competent and the other incompetent. The attorney who occupies the counsel table before the jury is in the best position to make a determination concerning the proper examination and the proper time for objections. An attorney's errors, if honest errors in judgment, are not proof of incompetency. *Haley v. State* (1956), 235 Ind. 333, 133 N. E. 2d 565; *Hendrickson v. State* (1954), 233 Ind. 341, 118 N. E. 2d 493.

In *Schmittler v. State* (1950), 228 Ind. 450, 93 N. E. 2d 184, this Court stated that:

> "It must be presumed that appellant's attorney discharged his full duty and it should require strong and convincing proof to overcome this presumption".

Our review of appellant's trial leads us to conclude that appellant totally lacks strong and convincing proof to overcome the foregoing presumption; in fact, there is an absence of any proof.

Appellant further complains because the Trial Court failed to rule on his motion for new trial for a long period of time, to-wit: 14 months, that he was denied a "speedy trial" by reason of this failure of the Trial Court. The attorney general urges that the trial had been concluded and that, therefore, rulings on the motion for new trial do not come within the Constitutional provision of "speedy trial". We find it unnecessary to make a determination on this point. Suffice it to say that appellant did have the remedy under Rule 1-13 of this Court which reads as follows:

> "Whenever any issue of law or fact shall hereafter be submitted to the court for trial, ruling, or decision, and the judge shall take the same under advisement, the court shall not hold the same under advisement for more than ninety (90) days . . . Provided, that if the judge shall fail to determine any issue of law or fact within the time above reserved, then upon written application of any of the parties to the action or their attorneys of record duly filed in the office of the clerk of said court and called to the attention of said judge before the announcement of the decision of the issue in question, the submission of said issue shall thereupon be withdrawn and the judge before whom said cause is pending shall be disqualified to hear or determine any of the issues in said cause, and a special judge shall be appointed to take jurisdiction thereof under the same rules and regulations pre-

scribed by law in cases where the judge is disqualified for hearing a given cause."

Appellant did not assert this remedy; in fact, appellant did not at any time take any overt action to call this delay to the attention of the Trial Court and did not, thereby, give the Trial Court an opportunity to correct any claimed error. Errors not raised in the Trial Court are not subject to review before this Court. *Martin v. State* (1963), 245 Ind. 224, 194 N. E. 2d.

The errors alleged in appellant's motion for new trial are without merit. The Trial Court did not commit error in refusing to permit appellant to file his belated motion for new trial and as we have discussed in this opinion, even if the belated motion for new trial had been filed, same was without merit.

The judgment is affirmed.

ARTERBURN, HUNTER and MOTE, JJ., CONCUR;

JACKSON, J., CONCURS IN RESULT.

APPENDIX B

IN THE

SUPREME COURT OF INDIANA

APPEAL FROM THE MARION CRIMINAL COURT, DIVISION 1

ERNEST CLIFTON LANGLEY, *Appellant,*	)	
v.	)	
	)	No. 30893
STATE OF INDIANA, *Appellee.*	)	

PETITION FOR REHEARING

Comes now the appellant in the above entitled cause, by counsel, and respectfully moves this Court for a Rehearing on the Judgment heretofore entered by this Court affirming the judgment of the trial court, the Marion Criminal Court, Division 1, and to reconsider its opinion in this case in the light of the following considerations and for the following grounds and reasons to-wit:

1. The Court rejected our contention that the trial court misinterpreted, misapplied and misconstrued Rule 2-40 of the Rules of this Court in that this Court affirmed the trial court's ruling denying Petition for Permission to File a Belated Motion for New Trial.

2. The Court, in its opinion, misapplies and misconstrues the pronouncements of *Hillman v. The State,* 123, N. E. 2d 180, and *Rhodes v. The State,* 189 Ind. 193, with reference to ineffective representation by court appointed trial counsel. This Court, on Page 6 of its opinion, said:

"The question of incompetency of trial counsel is not before this court because of the ruling of the Trial Court in refusing to grant permission to file a belated motion for new trial. The competency or incompetency of trial counsel was not presented in the original motion for new trial. However, in the interest of putting this matter at rest, we have reviewed the record in an effort to determine whether or not appellant's Constitutional Rights were denied by the Court failing to provide appellant with competent trial counsel.

"The second guessing of the trial counsel by appellant's present counsel amounts to "Monday morning quarterbacking". The transcript including the bill of exceptions indicates to this Court that appellant's trial counsel did his work creditably under difficult circumstances. Appellant now contends that his trial counsel failed to object to certain questions and failed to cross-examine on certain questions. A difference in strategy between attorneys does not make one competent and the other incompetent. The attorney who occupies the counsel table before the jury is in the best position to make a determination concerning the proper examination and the proper time for objections. An attorney's errors, if honest errors in judgment, are not proof of incompetency. *Haley v. State* (1950), 235 Ind. 333, 133 N.E. 2d 563; *Hendrickson v. State* (1954), 233 Ind. 341, 118 N.E. 2d 493.

> "In *Schmittler v. State* (1950), 228 Ind. 450, 93 N.E. 2d 184, this Court stated that:
>
> 'It must be presumed that appellant's attorney discharged his full duty and it should require strong and convincing proof to overcome this presumption.'

"Our review of appellant's trial leads us to conclude that appellant totally lacks strong and convincing proof to overcome the foregoing presumption; in fact, there is an absence of any proof."

3. The Court, in its opinion, misapplies and misconstrues and misinterprets the application of *Giles v. State of Maryland,* 386 U. S. 66, with reference to the denial of due process of appellant by the acts of the prosecution in suppressing evidence favorable to him at the trial, to-wit, the State's failure to call State's witnesses, Edward Moore and Theron Jackson who formerly were co-defendants with the defendant in the case at bar, and who were returned from the Indiana State Prison to the Marion County Jail to appear as witnesses for the State, and the State failed, neglected and refused to call them to testify because the State knew that their testimony would be beneficial to appellant and would result in evidence exculpating the appellant herein.

4. The Court, in its opinion, misconstrued, misapplied and misapprehended Rule 2-40 in its application to the case at bar because of the peculiar facts and circumstances of this case, and where the record enclusively shows that the court appointed counsel failed to file the Motion for New Trial on time as prescribed by statute by filing the same 37 days after the verdict, failed to make a thorough and complete examination of the defendant's defense, and failed, refused and neglected to interrogate witnesses for defendant's use, namely, the two co-defendants, who were available at the Marion County Jail, and whose testimony would be favorable and beneficial to defendant, and furthermore, the ineffective assistance of counsel was not made available to the trial court by the filing of the Belated Motion for New Trial, all of which was detrimental and prejudicial to the appellant herein.

5. The decision and judgment of this Court in its opinion that "the trial court did not commit error in refusing permission for appellant to file a belated motion for new trial" is not sustained by the record itself, and by the

Verified Petition for Permission to File Belated Motion for New Trial, and Verified Motion for New Trial.

This Court erred in holding the trial court did not abuse its discretion to refuse to permit the filing of a Belated Motion for New Trial when the record affirmatively shows blatent denials of constitutional rights of appellant to due process of law and equal protection of the law as set out in appellant's briefs.

6. The Court erred in holding that the court appointed trial counsel rendered effective representation and legal assistance to the appellant when the record is replete with grievous instances of ineffective assistance of counsel as set out in appellant's brief on Pages 66 to 91.

7. The Court in its finding and decision is in contravention with prior decisions of this Court with reference to ineffective assistance of counsel, namely *Rhoades v. State,* (1927) 199 Ind. 183, 156 N. E. 389; *Castro v. State,* (1925) 196 Ind. 385, 147 N. E. 321; *Wilson v. State,* (1943) 222 Ind. 63, 51 N. E. 2d 848; *Bradley v. State,* (1949) 227 Ind. 131, 84 N. E. 2d 580; *Sanchez v. State,* (1927), 199 Ind. 235, 157 N. E. 1; *State ex rel White v. Hilgeman,* (1941) 218 Ind. 572, 34 N. E. 2d; *Knox County Council v. State ex rel McCormick,* (1940) 217 Ind. 493, 29 N. E. 2d 405; *Abraham v. State,* (1949) 229 Ind. 179, 185, 91 N. E. 2d 358. The right of a defendant who is charged with crime to be represented by competent counsel is not open to question in this state. *Webb v. Baird,* (1854) 6 Ind. 13, 18; *Hendryx v. State,* (1892) 130 Ind. 265, 269, 29 N. E. 1131; *Todd v. State,* (1948) 226 Ind. 496, 81 N. E. 2d 784; *Hoy v. State,* (1947) 225 Ind. 428, 75 N. E. 2d 915.

8. The decision and judgment of this Court in its opinion affirming the judgment of the court below in denying a new trial on the ground that the verdict of the jury is not

sustained by sufficient evidence, and is contrary to law, is in conflict with *Brady v. State of Maryland,* 373 U: S. 83 in that the State of Indiana had a responsibility under the fair trial requirement of the 14th Amendment not to engage in deliberate concealment and the non-disclosure of pertinent and material and germane facts and evidence that would be beneficial and helpful to the defendant herein with reference to the two co-defendants, Jackson, and Moore, who were brought down from the Indiana State Prison to testify for the State and were not put on the witness stand by the State because the State knew their tesimony would be beneficial to the defendant. The action of the State of Indiana, prior to and during the trial, actively and intentionally suppressed evidence which would be beneficial and helpful to the defendant in that it would corroborate the defendant's story with reference his non-participation in the crime of robbery and would show that the two defendants were serving a much lighter sentence on a different charge because of the apparent lack of evidence to sentence them in the crime of robbery for which the defendant was sentenced in the trial court, and further, it would enable the defendant to test and/or disprove the credibility of the police officers and the filling station attendant as to the defendant's lack of complicity and/or participation in the crime.

9. The decision and judgment of this Court in its opinion, that "the error alleged in defendant's Motion for New Trial is without merit. The trial court did not commit error to permit appellant to file his Belated Motion for New Trial as we have discussed in this opinion even if the belated motion had been filed, the same was without merit," is contrary to the 14th Amendment to the Constitution of the United States, and Bill of Rights, and the Constitution of Indiana, with reference to criminal prose-

cutions regarding the right of an accused to be heard by himself and counsel, and to have compulsory witnesses in his behavior, as set out in Article 1, Section 13. And furthermore, it is in contravention of Article 1, Section 12 of the Constitution of Indiana with reference to all Courts shall be open and justice shall be administered speedily and without delay.

10. The decision and judgment of this Court is in conflict with *Wilson v. State* (1943) 196 Ind. 63 wherein this Court held:

> "With such a record before us, what is our duty? The easy course would have been to examine the motion for new trial and, having found that the errors relied upon are not mentioned therein, to have affirmed the judgment. For such a decision there are many precedents. But in a case involving an appellant's life or liberty we may not ignore prejudicial errors affecting his constitutional rights when, as here, they are clearly and adequately presented in appellant's brief with supporting bill of exceptions. The procedural rules that would prevent their consideration must give way to the fundamental principles of due process. For this course also there are precedents."

11. We further request this Honorable Court to reconsider its holding with reference to the service rendered by the court appointed pauper counsel, not that appellant contends that the court appointed counsel was not competent, but under the facts and circumstances of the case as shown by the record, that his representation was totally ineffective because of

(a) Lack of preparation;

(b) Lack of due diligence in objecting and failing to object to testimony during the trial;

(c) Failure to timely file Motion for New Trial.

(d) Failure to take the necessary precautionary measures to interrogate the co-defendants who received a much lesser sentence, and who were available at the Marion County Jail during the trial, and whose testimony would have exculpated or at least materially benefit appellant.

WHEREFORE, for the above and foregoing reasons, it is respectfully prayed that a hearing be granted and upon such rehearing, the decision of the Marion Criminal Court, Division 1 be reversed, because appellant was denied effective assistance of counsel in the trial court, and because the State knowingly suppressed evidence favorable to the defendant when the same was available during the trial, especially when the record substantiates the allegations of appellant in these two respects.

Respectfully submitted,

/s/ William C. Erbecker
WILLIAM C. ERBECKER
Attorney for Appellant

APPENDIX B-1

CLERK OF SUPREME AND APPELLATE COURTS

Kendal E. Mathews, Clerk
217 State House

Ernest Clifton Langley VS. State of Indiana

No. 30893

You are hereby notified that the Supreme Court has on this day DENIED Appellants Petition for Rehearing this 15th day of March, 1968, David M. Lewis, C. J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court,
this —— day of ——

Kendal E. Mathews
Clerk Supreme And Appellate Courts

Exhibit "A"

APPENDIX C

IN THE MARION CRIMINAL CIRCUIT COURT

DIVISION 1

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

STATE OF INDIANA,)
v.) CAUSE NO.
ERNEST CLIFTON LANGLEY,) CR25 183Y

VERIFIED BELATED MOTION FOR NEW TRIAL

Comes now ERNEST CLIFTON LANGLEY, the defendant in the above entitled cause, by counsel, and respectfully moves the court to grant him a new trial of the issues in said cause, for each and all of the following grounds and reasons, to wit:

1. That the defendant has just been released from the Indiana State Reformatory, Michigan City, Indiana, on July 12, 1965, where he has been incarcerated for more than a year pending a ruling on a motion for a new trial and the filing of pleadings by the defendant while incarcerated evidences his intentions to appeal the said judgment of the verdict to the Supreme Court of the State of Indiana.

2. That defendant's PETITION FOR PERMISSION TO FILE BELATED MOTION FOR NEW TRIAL is attached hereto and presents for this Court's consideration numerous instances of grievious and prejudicial error in the proceedings supporting the aforesaid judgment which was a sentence of ten to twenty-five years on a verdict of a jury finding the defendant petitioner guilty of rob-

bery, whereby defendant was unlawfully deprived of his fundamental rights to a fair and impartial trial guaranteed by the State and Federal Constitutions; that defendant hereby adopts said Motion in its entirety and incorporates the same herein as if it was set forth verbatim.

3. That defendant has been previously precluded from asserting the matters contained in his BELATED MOTION FOR NEW TRIAL, and he has acted with all due diligence in presenting said motion to this Court; that from the time of defendant's trial on the — day of ———, 196— until the present time, he has been under the disability of incarceration by being in confinement, restraint and custody of the State of Indiana, and because of said disability, he has been unable to personally investigate or discover the facts of this cause or the law applicable thereto; that defendant is an ignorant layman, untrained in law, and without the requisite skill and knowledge to represent himself in even the most simple legal proceeding, and at no time in this cause could competently and intelligently know and decide *pro se* what actionable and provable facts existed in the various aspects of this cause, what rules, laws and constitutional provisions existed and were applicable herein, or what procedural requirements existed and the necessity of compliance therewith in order to preserve and protect defendant's rights in the premises; that from the inception of this cause, defendant has desired to be represented by competent counsel and to have the assistance of competent counsel to advise and assist him in his defense, and defendant has not waived and has not and does not desire to waive his right to competent counsel in this cause; that at all times in this cause, defendant has been without funds or means of his own and forced to rely on the generosity of his family and friends for financial assistance in employing counsel in his defense and in

the prosecution of this motion; that immediately after defendant's arraignment he employed a privately-retained attorney, but subsequent to failing to appear for trial he was placed in jail and thereupon the court appointed Ralph May as court-appointed attorney to represent defendant in this cause, and said defense attorney did appear and represent said defendant during said trial but during the progress of said trial said court appointed attorney failed and neglected to completely and properly prepare a defense in defendant's behalf and all during the time of defendant's incarceration prior to said trial, said Court-appointed attorney appeared only twice at the County Jail for counsel with said defendant; that during said time, while defendant was incarcerated, and before and during the trial of this cause, defendant requested said Court-appointed attorney to supoena and have present at his trial certain witnesses to testify in defendant's behalf, but said Court-appointed attorney, through neglect and inadvertence, did fail to do the same; and said Court-appointed attorney further failed and neglected to take the necessary and proper steps to preserve "and protect" defendant's constitutional rights before and during said trial; that during said trial said Court-appointed attorney was inadequate and ineffective in defendant's behalf in that he failed to subpoena certain witnesses in defendant's behalf; he failed and neglected to utilize certain evidence available at said trial in defendant's behalf; he failed to completely and properly interrogate the state's chief prosecuting witness with reference to the asking of certain questions relative to the identification of defendant, and said attorney failed and neglected to properly and completely investigate the facts and law of said case and failed to make proper objection and move to present and preserve defendant's vital rights, claims and interests and defense before and during

said trial, and failed to take the necessary and proper steps to preserve all the questions to be asserted and raised on appeal; and in all ways, probably due to the pressure of other litigation where his services were demanded as Court attorney or in other cases, said Court-appointed attorney failed, neglected and refused to give ample and sufficient time to a proper defense of plaintiff's case herein; that at no time in said case was defendant waived or acquiesced in a waiver by said Court-appointed attorney of any of defendant's rights, claims or defenses; that at all times herein defendant requested that his counsel protect and preserve each and all rights existing in this cause; that the failure to properly present the questions now asserted in this BELATED MOTION FOR NEW TRIAL was due wholly and entirely to the lack of preparation and knowledge and the total ineffectiveness of said Court-appointed counsel, and was not caused or occasioned by any voluntary or knowing act of the defendant.

That probably because of the multitudinousness of the cases to which he was assigned as court appointed defense counsel, said court appointed attorney was ineffective in the following:

(1) Said court appointed counsel failed and neglected to properly propound questions to the prosecuting witness which would have elicited testimony that defendant was not present at the time and place of the commission of the robbery, and

(2) Said court appointed attorney failed, neglected, and refused to permit the two co-defendants to testify, namely, Edward Moore and Theron Jackman, as witnesses for the defendant in this case, the defendant having evidenced his desire to have them so testify and they having agreed so to do; their evidence being relative and material to testi-

mony to prove that defendant was not guilty of the crime of robbery charged herein; and

(3) Said court appointed attorney failed, neglected, and refused completely and thoroughly cross-examine the prosecuting witness, to explain fully and completely the degree of participation, if any, of the defendant herein, and failed to ask the necessary and proper questions to determine the non-participation of defendant in said crime as evidenced by prior declaration and assertion of the prosecuting witness;

(4) Said court appointed attorney failed, neglected, and refused to confer with and interrogate the aforesaid two co-defendants to corroborate, ascertain, and develop, evaluate, and determine their testimony with reference to the non-participation of the defendant in said crime so as to enable defense and counsel to properly prepare a defense thereon;

(5) Said court appointed attorney, by his failure to call as defense witnesses the aforesaid two co-defendants, inadvertently suppressed evidence favorable to the defendant and thus deprived the defendant of the opportunity to prove and show to the jury that the two co-defendants, who actually perpetrated the crime, received a much lighter sentence than did the defendant herein, who was not an active participant in said crime, but who nevertheless was being charged with, and was being tried on, and was found guilty of, a much greater offense, to-wit, robbery, which carried an indeterminate sentence of ten to twenty-five years.

4. That in addition to the aforesaid other grounds alleged and set out herein, the defendant prays the Court to grant him a new trial on the following grounds and causes, or any of them:

(a) Accident and/or surprise which ordinary prudence could not have guarded against as hereinafter set out by the affidavit of a co-defendant which is attached hereto and made a part of this Motion and marked Exhibit "A";

(b) Newly discovered evidence, material for the defendant, which he could not with reasonable diligence have discovered at the trial, all of which is set out herein by an affidavit of the co-defendant and which is attached hereto and made a part hereof, and for identification, marked Exhibit "A";

(c) Irregularities in the proceedings of the court and jury or for any order of the court or abuse of discretion by which said defendant was prevented from having a fair trial in this, to-wit:

(1) The court erred in permitting the State of Indiana, by the deputy prosecuting counsel trying said cause, to subpoena the two co-defendants, who allegedly were subpoenaed by the State as witnesses for the State to testify against the defendant herein, and the State refused to allow said co-defendants to testify, knowing that their evidence was favorable to the defendant, and thus the State suppressed evidence favorable to the defendant which said evidence was exclusively within the State's control; that the State well knew what the testimony of the co-defendants would be as shown by defendant's Exhibit which is attached hereto, made a part of this Motion, and for identification, marked Exhibit "A".

(2) The court erred in not requiring the deputy prosecuting attorney trying said cause to investigate and determine the circumstances surrounding the incarceration of the co-defendants herein, namely Theron Jackman and

Edward Moore, they having been allegedly charged with the same crime as defendant herein, and they having previously been convicted on another crime carrying a much less severe sentence, after the defendant had requested his court appointed attorney to use said co-defendants as witnesses in defendant's behalf, all as shown by defendant's Exhibit which is attached hereto, made a part of this Motion, and for identification, marked Exhibit "A".

(d) The State's known use of perjured testimony and/or the State's refusal to present testimony and its suppression of the same, which would prove that defendant was not guilty of and did not participate in said crime of robbery, all as shown by defendant's Exhibit which is attached hereto, made a part of this Motion hereof, and for identification, marked Exhibit "A".

5. A. Defendant further says that he never at any time, knowingly, intelligently, intentionally, and voluntarily and willingly waived any of his constitutional rights, by,

(a) Nonascertion of the same before and during appeal when defendant was ignorant of the same and did not fully know, realize, understand and comprehend the said rights:

(b) By personally consenting to a waiver of his constitutional rights by his attorney;

(c) His failure to properly pursue and apply state procedural rules, statutes, and remedies because of ineffective assistance of counsel and defendant's own ignorance of the same.

(d) Any act, deduction, omission, failure, nonascertion or choice made by his counsel was not participated in by defendant.

B. Defendant further says that he never knowingly and intentionally relinquished and/or never willingly, intentionally and understandably waived any of his constitutional rights, complained of and about as hereinabove set out, by participating in any nonassertions of his constitutional rights by his counsel.

C. Defendant further says that the conduct of his counsel, without consultation with defendant, did not bind defendant to a waiver of his constitutional rights to object to the matter, facts, and statements, all set out hereinabove with particular reference to all allegations of deprivations of constitutional rights guaranteed by the Federal Constitution and the Indiana Constitution; that defendant was never fully and completely advised of his constitutional rights, with reference to the aforesaid violations of the same, and defendant never took any intelligent and deliberate action to effectively and knowingly waive, relinquish, or abandon any of his constitutional rights, with reference to any action or non-action by his counsel.

D. That defendant's counsel did not consult with defendant with reference to the aforesaid constitutional rights of defendant, and the defendant did not understandingly and knowingly forego these rights; that defendant lacked the capacity to have understandingly and knowingly waive and forego the aforesaid constitutional rights.

E. That defendant was completely dependent upon his counsel for a proper defense because he was ignorant and unskilled in the law and did not comprehend the nature or meaning of the State and Federal Constitutions, the Statutes and laws, or the rights provided thereunder, and being entirely dependent upon his counsel for his defense, he is and was *not* bound by the fictitious "waiver" of his attorney.

There is no legal significance to the presence or absence of consultation of counsel with defendant and the presence or absence of express consent by defendant to any "waiver", because

(1) These protections are not adequate safeguards against forfeiture of constitutional rights of defendant; and

(2) In this case, defendant knew nothing of his rights or whether it would be strategically wise to waive them in the situations hereinabove complained of.

The evidence in this case shows no consultation between counsel and defendant on waiver of constitutional rights, and indeed defendant here lacked the comprehension to make an intelligent waiver of his constitutional rights. If the State may treat counsel's inaction as implied "waiver", the State is being permitted to establish a ground rule that orderly state procedure compels a client to be bound by his lawyer's actions and inaction and legitimizes a procedural default and deprives this defendant of his opportunity to vindicate his constitutional rights.

F. The record in this case conclusively shows that defendant made no deliberate, intelligent, and meaningful waiver of his objections to the violation of his constitutional rights; and, taking "waiver" as a formula standing for the rule that nonassertion of an objection to the proceedings and procedure complained of above vitiates the objection, defendant contends that a state ground rule to frustrate the federally guaranteed right to a fair trial before an unbiased and impartial jury is illegal. Trial and appellate strategy, adopted by counsel without prior consultation with accused will not, when defendant is incarcerated for over a year and a half, preclude this defendant from asserting a constitutional claim.

6. Defendant further says that he does not contend or maintain that Ralph May, his former court appointed attorney, is not or was not a competent attorney, and a respected member of the bar of this court, and an intelligent and competent attorney; defendant forcefully contends that he was denied effective assistance of counsel, as guaranteed him by the Fourteenth Amendment to the United States Constitution and the applicable provisions of the State Constitution, and the seemingly perfunctory and casual representation by said court appointed attorney, augmented by his seemingly carelessness, negligence, and lack of diligence which was probably mostly caused by the multitudinous other criminal actions which were assigned to him as pauper counsel, which combined with the small length of time made available to said court appointed attorney, made it virtually impossible for said court appointed attorney to give defendant's case the necessary consultation, preparation, and trial strategy that was essential to a full and complete protection of defendant's constitutional rights. Defendant reiterates that he is not condemning said court appointed attorney by accusing him of any wilful misconduct but that he does maintain that, in this particular case alone, probably solely by the pressure of case loads of other pauper defendants, assigned to him (Ralph May), that said court appointed counsel was virtually unable to give the required time and effort for a proper preparation of and the serving of for appeal, the points and questions presented in the instant Motion.

7. Defendant further alleges and says that there is now filed and pending in this court a motion for a new trial which was timely and seasonably filed after defendant was found guilty in the instant charge, and defendant respectfully prays this Honorable Court to consolidate the two said motions for a new trial so that,

(a) Defendant's rights will not be prejudiced and jeopardized and that he will not be estopped from presenting simultaneously all of the grounds and reasons that existed at the same time; and

(b) That this proceeding may be heard, tried, and disposed of speedily and expeditiously, and consolidated, so that defendant will not be emasculated by an appeal to the Supreme Court, if the same is necessary; and

(c) A consolidation would not only narrow the issues herein and present concisely all questions raised, but would also lessen the costs of an appeal if these motions are not sustained.

8. That defendant has served a true and complete copy of this Motion upon the Prosecuting Attorney of Marion County, Indiana, and upon the Attorney General of Indiana, and that such service was duly made on or immediately prior to the date said Motion was filed in this court.

WHEREFORE, defendant-petitioner respectfully prays this Honorable Court to sustain his Verified Belated Motion for New Trial and to grant him a new trial in this cause, and that the Court grant such other, further, proper, complete, and ancillary relief as it may deem necessary and proper in the premises.

Respectfully submitted,

/s/ Ernest C. Langley,

ERNEST CLIFTON LANGLEY,

Defendant-Petitioner

VERIFICATION

Ernest Clifton Langley, being duly sworn upon his oath, deposes and says:

That he has read the foregoing Motion and that the matters, facts and statements contained therein are true to the best of his knowledge, information, and belief.

FURTHER, AFFIANT SAITH NOT.

/s/ Ernest C. Langley
Affiant

Subscribed and sworn to before me, a Notary Public, this 2 day of August, 1965.

/s/ William C. Erbecker,
Notary Public

My commission expires:
June 9, 1968

EXHIBIT A

To Appendix C

STATE OF INDIANA)
) SS:
COUNTY OF LAPORTE)

AFFIDAVIT

I, Edward Moore, being duly sworn upon oath, depose and say:

That on the night of December 27, 1961, Theron Jackman, Ernest Langley, his wife and I were stopped while driving in an automobile at 38th and Fall Creek Parkway, Indianapolis, Indiana by members of the Indiana Police Department, who, then took us to a Service Station at 40th and Keystone, where an alleged robbery had occurred. We were told to get out of the automobile and line up for viewing by the Service Station attendant to see if he could identify any of us as having been the persons that allegedly robbed him. At this time, he indicated, by pointing his finger at Theron Jackman and myself, and stating: "These two men were the ones that robbed me. I have never seen this other man and woman."

Due to a malfunction of the carburetor of the car we were riding in, we stopped in front of this Service Station on the street, and while Ernest Langley had the hood of the car in a raised position and was working on the carburetor, Theron Jackman and I said we were going to the restroom or words to that effect. Theron Jackman and I robbed the attendant, taped him up, and then returned to the car which had been repaired by that time, and told

Ernest Langley: "Let's get out of here." We were stopped just a short distance from the Service Station by Officers of the Indianapolis Police Department.

In May of 1964, Theron Jackman and I were returned from the Indiana State Prison to the Marion County Jail in Indianapolis, Indiana to appear as witnesses for Ernest Langley at his trial. While waiting in the court room to be called as a witness for the State, a deputy prosecutor and a detective came and asked me how I was going to testify, if I was going to tell the truth or not? I answered: "That I certainly would, as I did not want a charge of perjury brought against me on top of what I already had." Then they asked me several questions about the robbery and Ernest's connection with it. When I had answered these questions, they said something about this hurting their case, so they were going to send Jackman and I back to jail until after this trial was over; this was done immediately and we were therefore prevented from testifying at Langley's trial.

I would like to make it clear that Ernest Langley had not been on the property where the Service Station is located, during the night of December 27, 1961, until we were returned there by the Officers of the Indianapolis Police Department. Also, at this time, the attendant did not identify said Ernest Langley or his wife.

/s/ Edward Moore

Edward Moore, Affiant

Subscribed and sworn to before me, the undersigned Notary Public, in and for said County and State, this 26th day of July, 1965.

/s/ Owen W. Hurley
Notary Public

(SEAL)
My Commission Expires:
March 11, 1967.

SUPREME COURT, U. S.

FILED

JUL 15 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 213

ERNEST CLIFTON LANGLEY,
Petitioner,

vs.

STATE OF INDIANA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN J. DILLON
Attorney General of Indiana
DOUGLAS B. McFADDEN
Assistant Attorney General
MURRAY WEST
Deputy Attorney General
Attorneys for Respondent.

Office of Attorney General
219 State House
Indianapolis, Indiana
Phone 317/633-5512

C. E. Pauley & Co., Inc., Indianapolis

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 213

ERNEST CLIFTON LANGLEY,
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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of Indiana is reported at 232 N.E.2d 611.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

Rule 23(j)(4) of the United States Supreme Court states as follows:

> "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

Under the "Questions Presented" heading on pages 2, 3 and 4 of the Petition, it is not clear as to just what Petitioner contends are the federal questions presented. Therefore, for this reason alone, the Petition should be denied. Rule 23(j)(4), supra.

The questions presented, in Respondent's view, are as follows:

1. Whether the strict 30-day time limit for filing Motion for New Trial, as imposed by Indiana law upon all criminal defendants regardless of monetary standing, is a violation of due process.

2. Whether the "speedy trial" provision of the sixth amendment applies to post-conviction proceedings.

CONSTITUTIONAL PROVISION INVOLVED

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." Sixth Amendment to the U.S. Constitution.

STATUTE BEING QUESTIONED

> "The motion for a new trial and the causes therefor shall be in writing and must be filed within thirty days from the date of the verdict or finding; . . ." Burns IND. STAT. ANN. 9-1903.

STATEMENT OF THE CASE MATERIAL TO THE QUESTIONS PRESENTED

On January 15, 1962, the State of Indiana filed an affidavit charging Petitioner with Robbery.

On February 1, 1962, Petitioner pleaded not guilty to said charge.

On March 30, 1964, trial by jury was held and the jury returned a verdict of guilty of the crime of robbery.

On May 7, 1964, Petitioner filed a Motion for New Trial.

On August 3, 1965, Petitioner filed a Verified Petition for Permission To File a Belated Motion for New Trial, under Rule 2-40 of the Supreme Court of Indiana.

On September 23, 1965, the trial court overruled Petitioner's Motion for New Trial and denied Petitioner permission to file a Belated Motion for New Trial.

ARGUMENT

I.

TIME LIMITS TO THE FILING OF A MOTION FOR NEW TRIAL ARE NOT UNCONSTITUTIONAL

Petitioner seems to be contending that the 30-day time limit for filing a motion for new trial is unconstitutional. But this court itself set a time limit for the filing of motions for new trial in federal criminal cases. Rule 33 of the Federal Rules of Criminal Procedure provides as follows:

> "The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within

seven days after verdict or finding of guilty or within such further time as the court may fix during the seven day period" (Emphasis added).

This Court has held that a "state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Brown* v. *Mississippi*, 297 U.S. 278, 56 Sup. Ct. 461 (1936).

Furthermore, in *Brown* v. *Allen*, this Court held that due process is not violated by a state's action in refusing review of conviction after defendant failed to perfect his appeal within the time prescribed, even though the appeal was perfected one day after lapse of the time period. *Brown* v. *Allen*, 344 U.S. 443, 73 Sup. Ct. 397 at 421 (1953). See also 21 Am. Jur. 2d, Criminal Law, Sec. 227, footnote 13.

Petitioner in the case at bar has not shown in any way that a statute imposing a time limit on filing motions for new trial is unconstitutional.

II.

THE "SPEEDY TRIAL" PROVISION OF THE CONSTITUTION IS NOT APPLICABLE IN THE CASE AT BAR

Petitioner apparently is contending that he was denied a right to "speedy trial" because the trial judge waited 14 months before ruling on his Motion for New Trial. He seems to be contending that "speedy trial" means speedy appellate review, and he cites the 6th Amendment to the U.S. Constitution to support his contention. First of all, the "speedy trial" provision only applies to the time between the arrest and the trial, not between the time of trial and the ruling on the motion for new trial. Secondly, there is

no *constitutional right* to appeal. *Lott* v. *Pittman*, 243 U.S. 588, 37 S.Ct. 473 (1917). So, logically, the "right to speedy trial" cannot be extended to include the right to speedy appellate review.

In *Ash* v. *State*, 238 Md. 317, 208 A.2d 691 (1965), the defendant contended that he was deprived of his constitutional right to a speedy trial because a long period of time elapsed from the filing of his motion for new trial to the time it was ruled on. In *Ash*, the Maryland court held that a "motion for new trial or hearing thereon do not constitute a 'trial' or any constituent part thereof within the meaning of the constitutional requirement of a right to speedy trial."

In *State* v. *Tahash*, 277 Minn. 309, 152 N.W.2d 786 at 789 (1967), the Minnesota Supreme Court held that the "right to speedy trial does not include a right to speedy appellate review within the sense of the Sixth Amendment."

Furthermore, Appellant had his remedy by way of Indiana Supreme Court Rule 1-13 (the Lazy Judge Rule) which provides, in part, as follows:

> "Whenever any issue of law or fact shall hereafter be submitted to the court for trial, ruling, or decision, and the judge shall take the same under advisement, the court shall not hold the same under advisement for more than ninety (90) days . . . Provided, that if the judge shall fail to determine any issue of law or fact within the time reserved, then upon written application of any of the parties to the action or their attorneys of record duly filed in the office of the clerk of said court and called to the attention of said judge before the announcement of the decision of the issue in question, the submission of said issue shall thereupon be withdrawn and the judge before whom said cause is pending shall be disqualified to hear or determine any of the issues in said cause, and a special judge shall be appointed to take jurisdiction thereof under

> the same rules and regulations prescribed by law in cases where the judge is disqualified for hearing a given cause."

Petitioner did not assert his rights under the aforesaid Rule 1-13. Therefore he has no cause to complain now.

CONCLUSION

The petition fails to present a federal question of sufficient substance to warrant a granting of a writ of certiorari to the Supreme Court of Indiana and said petition should therefore be denied.

Respectfully submitted,

JOHN J. DILLON
Attorney General of Indiana

DOUGLAS B. MCFADDEN
Assistant Attorney General

MURRAY WEST
Deputy Attorney General

Attorneys for Respondent.